{{4-1-90 p.A-136}}

[¶5012] FDIC Docket No. FDIC-82-5k (3-22-83)

Civil money penalty assessed against a bank director who was principal shareholder, chairman of the board, and president of the bank, for extensions of credit to the director in amounts exceeding 10% of the bank's capital and unimpaired surplus.

[.1] Directors—Duties of President and Chairman of the Board
A chairman of the board of directors and president of the bank is responsible for violations of applicable laws and regulations.

[.2] Civil Money Penalties—FDIC Authority
The FDIC has legal authority to impose a civil money penalty on a person participating in the affairs of a bank who caused, brought about, participated in, aided, or abetted violations of law.

[.3] Extension of Credit—Defined
An extension of credit is a making or renewal of any loan, a granting of a line of credit, or an extending of credit in any manner whatsoever, and includes: any other transactions as a result of which a person becomes obligated to pay money (or its equivalent) to a bank, whether the obligation arises directly or indirectly, or because of an endorsement on an obligation or otherwise, or by any means whatsoever.

[.4] Civil Money Penalty—Notice of Hearing
There is no requirement that a Notice of Hearing set forth all of the factual bases for the allegations against a bank director. It is sufficient that a Notice allege violations of law in that the bank director borrowed more from the bank than he was statutorily allowed to borrow as an officer and principal shareholder of the bank.

[.5] Practice and Procedure—Hearsay—Business Records Exception
Records prepared in the regularly conducted course of business may be received into evidence as an exception to the Hearsay Rule if it was the regular practice of the business to prepare such records as shown by the testimony of the custodian or other qualified witness, unless there is an indication of lack of trustworthiness.

[.6] Practice and Procedure—Hearsay—Custodian of Bank Records
A custodian of bank records at the time of a hearing is a proper person through which to introduce the documents.

[.7] Practice and Procedure—Hearsay—Specifically Prepared Documents
Exhibits that are specially prepared for a proceeding are admissible if the exhibit accurately reflects the data taken from the underlying or supporting documents, and opposing parties are permitted access to the underlying or supporting documents of the exhibit.

[.8] Civil Money Penalties—Amount—Statutory Standard
In determining the amount of a civil money penalty, the following factors must be considered: the appropriateness of the penalty with respect to the size of financial resources and good faith of the bank or person; the gravity of the violations; the history of previous violations; and such other matters as justice may require.

**In the Matter of * * * , DIRECTOR
AND OFFICER, * * * (INSURED
STATE NONMEMBER BANK)**

**DECISION AND ORDER TO PAY
CIVIL MONEY PENALTY
FDIC-82-5K**

On January 25, 1982 the Board of Directors of the Federal Deposit Insurance Corporation, pursuant to

the provisions of Section 18(j)(3) of the Federal Deposit Insurance Act (the "Act") (12 U.S.C. § 1828(j)(3)) and Part 308 of the FDIC's Rules and Regulations (12 C.F.R. Part 308 (1982)), issued a NOTICE OF ASSESSMENT OF CIVIL MONEY PENALTY, FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDER TO PAY {{4-1-90 p.A-137}}against * * * , in his individual capacity while serving as principal shareholder, chairman of the board and president of The Bank of * * *, charging violations of Section 22(h) of the Federal Reserve Act, as amended (12 U.S.C. § 375b), and Regulation O of the Board of Governors of the Federal Reserve System (12 C.F.R. Part 215) ("Regulation O") promulgated thereunder, made to apply to State nonmember banks under Section 18(j) of the Act (22 U.S.C. § 1828(j)):

On May 13, 1982, an administrative hearing was held in * * *, before Administrative Law Judge John M. Vittone, who filed his Recommended Decision, with findings of fact and conclusions of law, on November 24, 1982.

The Board of Directors of the FDIC has considered the record and the applicable law and has agreed with the findings of fact and conclusions of law of the Administrative Law Judge in their entirety.

After taking into account the appropriateness of the penalty with respect to the financial resources and good faith of * * *, in his capacity as principal shareholder, chairman of the board and president of The Bank of * * *, the gravity of the violations, history of previous violations, and such other matters as justice may require, it is

ORDERED, that the Board of Directors of the FDIC hereby adopts the findings of fact and conclusions of law of the Administrative Law Judge, a copy of which is attached hereto, in their entirety.

FURTHER, ORDERED, that a penalty of $10,000 be, and hereby is, assessed against * * * pursuant to Section 215.4(c) of Regulation O (12 C.F.R. § 215.4(c)) and Section 18(j)(3)(A) of the Act (12 U.S.C. § 1828(j)(3)(A));

FURTHER ORDERED, that the penalty imposed hereby shall be payable and collected not later than 60 days from the date of this ORDER.

By direction of the Board of Directors.

Dated at Washington, D.C. this 22nd day of March, 1983.

/s/ Hoyle L. Robinson
Executive Secretary

NOTICE OF ASSESSMENT OF CIVIL MONEY PENALTY, FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDER TO PAY
FDIC-82-5k
RECOMMENDED DECISION OF THE ADMINISTRATIVE LAW JUDGE

Background

On January 25, 1982, the Board of Directors of the Federal Deposit Insurance Corporation issued a Notice of Assessment of Civil Money Penalty, Findings of Fact and Conclusions of Law, and Order to Pay Civil Money Penalty ("Notice") pursuant to section 18(j)(3) of the Federal Deposit Insurance Act (12 U.S.C. § 1828(j)(3)) against * * * ("respondent"), in his individual capacity while serving as principal shareholder, Chairman of the Board, and President of the Bank of * * *. The Notice charged that Mr. * * * had violated section 22(h) of the Federal Reserve Act, as amended (12 U.S.C. § 375(b)) and Regulation O of the Board of Governors of the Federal Reserve System (12 C.F.R. Part 215). Regulation O was made applicable to state nonmember banks under section 18(j) of the Federal Deposit Insurance Act (12 U.S.C. § 1828(j)).

On February 16, 1982, the FDIC received a telegram from respondent's counsel requesting a hearing with regard to the Notice.

On April 27, 1982, Counsel for FDIC petitioned the undersigned for Findings of Fact and Filing of Recommended Decision. FDIC's counsel demonstrated in the petition that respondent had failed to file a timely answer as required by section 308.06 of the Rules of Practice and Procedure (12 C.F.R. § 308.06). At the initiation of the undersigned a conference call was held between the parties and the judge. During that call, it became clear that respondent's counsel was operating under an earlier version of the FDIC's Rules of Practice. Accordingly, FDIC's petition was denied and respondent was ordered to respond to the Notice. Mr. * * * response was received on May 5, 1982. On May 11, FDIC counsel filed a Motion for Leave to File Reply to the respondent's late-filed response. The FDIC's motion was granted (Tr. 10).[12]

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Citation to the transcript of the proceeding will be cited as TR.

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[2] FDIC also filed a motion for Supoena *duces tecum* on May 11, 1982. The motion was discussed at the hearing (TR. 10–17) and was ultimately withdrawn by counsel. (TR. 353-54).

A tentative hearing date was set for April 14, 1982, and was rescheduled for April 27, 1982, at Mr. * * * request. On April 23, Mr. * * * counsel requested a postponement of the hearing because of a conflict with another trial. The hearing was postponed until May 13, 1982, when a formal hearing was held in this matter before the undersigned.

The record in this matter consists of, among other things, the following: (1) the Notice of Assessment of Civil Money Penalty, Findings of Fact and Conclusion of Law, and Order to Pay; (2) Response of * * *; (3) FDIC's Reply to Response of * * *; (4) a hearing transcript consisting of 379 pages of testimony of witnesses called by the FDIC; (5) a total of 12 documentary exhibits introduced during the hearing by the FDIC (FDIC-1 through FDIC-12)[3]; and (6) proposed findings of fact, conclusions of law and briefs and reply briefs filed by the respondent and FDIC counsel.

Findings of Fact

1. The Bank, during all times pertinent to this proceeding, had its principal place of business at * * *, and was a state chartered bank insured by the FDIC but not a member of the Federal Reserve System. (Response of * * * at page 2, par. 1.)

2. The Bank was at all times subject to the provisions of the Federal Deposit Insurance Act (12 U.S.C. §§ 1811, *et seq*), the Rules and Regulations of the FDIC (12 C.F.R. Chapter III), and Regulation O of the Board of Governors of the Federal Reserve System (12 C.F.R. Part 215), as made applicable to the Bank under the provisions of 12 U.S.C. § 1828(j)(2). (Response of * * * at page 2, par. 2.)

3. At all times pertinent to the proceeding, * * * was Chairman of the Board of Directors, President and principal shareholder of the Bank. (Response of * * * at page 2, par. 3.) As such, he was, at all times pertinent to this proceeding, subject to the provisions of Regulation O under 12 U.S.C. § 1828(j)(3)(A).

4. From April 18, 1979 through July 25, 1979, the Bank extended credit to respondent in the amount of $74,000. During the same period of time, according to the Bank's report of condition filed as of March 31, 1979, which was the report of condition most recently filed prior to the April 18, 1979, transaction date, 10 percent of the Bank's capital and unimpaired surplus did not exceed $36,400. (TR 92; FDIC-1 and FDIC-8).

5. From July 26, 1979 through December 23, 1979, the Bank extended credit to respondent in the amount of $74,000. At the time of the July 26, 1979, transaction, 10 percent of the Bank's capital and unimpaired surplus, as reflected by the June 30, 1979, report of condition, did not exceed $33,900. (TR 92; FDIC-1, FDIC-7 and FDIC-8).

6. From December 24, 1979 through April 13, 1980, the Bank extended credit to respondent in the amount of $100,000. During the same period of time, 10 percent of the Bank's capital and unimpaired surplus was $36,000 according to the report of condition filed September 30, 1979 and $48,500 according to the report of condition filed December 31, 1979. (TR 93; FDIC-1, FDIC-7 and FDIC-8).

7. From April 14, 1980 through December 22, 1980, the Bank extended credit to respondent in the amounts of $15,000 and $40,000. During the same period of time, 10 percent of the Bank's capital and unimpaired surplus was between $44,100 and $44,400 according to the reports of condition of March 31, 1980, June 30, 1980, and September 30, 1980. (Tr. 93–94; FDIC-1, FDIC-7, FDIC-8).

8. From December 23, 1980 through December 29, 1980, the Bank extended credit to respondent in the amount of $65,000. During the same period of time, 10 percent of the Bank's capital and unimpaired surplus according to the September 30, 1980, report of condition did not exceed $44,100. (TR 94; FDIC-1, FDIC-7 and FDIC-8).

9. From December 30, 1980 through March 1, 1981, the Bank extended credit to

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[3] In their briefs and reply briefs, FDIC and respondent state that authenticated copies of consolidated reports of condition ("call reports") of the Bank of * * * were received into evidence. This is erroneous. The call reports were not offered or received into the evidence of record of this proceeding. The only documents received into evidence containing information from any call reports are FDIC-7 and FDIC-8 which summarize certain data contained in 12 call reports dated from March 31, 1979 through December 31, 1981 (not March 1982 as FDIC's reply brief states).

Also two exhibits proposed for introduction by FDIC were rejected (FDIC-13 and 14). (Tr. 346-52). Just as FDIC 13 and 14 are not a part of this record neither is any testimony contained in the transcript which refers to those exhibits.

{{4-1-90 p.A-139}}respondent in the amount of $66,000. During the same period of time, 10 percent of the Bank's capital and unimpaired surplus according to the September 30, 1980 report of condition did not exceed $44,100. (TR 94–95; FDIC-1, FDIC-7 and FDIC-8).

10. From March 2, 1981 through March 8, 1981, the Bank extended credit to respondent in the amount of $66,000. During the same period of time, 10 percent of the Bank's capital and unimpaired surplus according to the December 31, 1980 report of condition did not exceed $48,400. (TR 95; FDIC-1; FDIC-7 and FDIC-8).

11. From March 9, 1981 through May 5, 1981, the Bank extended credit to respondent in the amount of $100,000. During the same period of time, 10 percent of the Bank's capital and unimpaired surplus according to the December 31, 1980, report of condition did not exceed $48,400. (TR 95; FDIC-1; FDIC-7 and FDIC-8).

12. From May 6, 1981 through August 6, 1981, the Bank extended credit to respondent in the amount of $100,000. During the same period of time, 10 percent of the Bank's capital and unimpaired surplus according to the March 31, 1981 report of condition did not exceed $49,300. (TR 95–96; FDIC-1, FDIC-7 and FDIC-8).

13. On February 1, 1980, January 5, 1981, May 8, 1981, and July 24, 1981, respondent was advised and warned by representatives of the FDIC of the existence of violations of section 22(h) of the Federal Reserve Act (12 U.S.C. § 375b) and section 215.4(c) of Regulation O (12 C.F.R. § 215.4(c)). (TR 246–247, 225-26, 255-57, 260-65, 286-96, 329-30, 333-35, and 344-45; FDIC-9, FDIC-10, FDIC-11 and FDIC-12).

Conclusion of Law

1. The FDIC has jurisdiction over respondent and the subject matter of this proceeding.

2. Regulation O (12 C.F.R. Part 215) was adopted by the Board of Governors of the Federal Reserve System in implementation of section 22(h) of the Federal Reserve Act (12 U.S.C. § 375b).

3. From April 18, 1979 through April 13, 1980, and from December 23, 1980 through August 6, 1981, * * * was a "director," "executive officer" and "principal shareholder" of the Bank within the meaning of Regulation O (12 C.F.R. §§ 215.2(c), 215.2(d) and 215.2(j)).

[.1**]** 4. As Chairman of the Board and President of the bank, respondent was responsible for violations of applicable laws and regulations, including section 22(h) of the Federal Reserve Act (12 U.S.C. § 375b) and Regulation O (12 C.F.R. Part 215).

5. From April 18, 1979 through April 13, 1980, and from December 23, 1980 through August 6, 1981, the Bank extended credit to * * * in excess of the limitations prescribed in section 22(h) of the Federal Reserve Act (12 U.S.C. § 375b) and section 215.4(c) of Regulation O (12 C.F.R. § 215.4(c)) in violation of said statute and regulation.

6. From April 18, 1979 through April 13, 1980, and from December 23, 1980 through August 6, 1981, * * * , as President and chief executive officer and a director of the Bank, was a person participating in the affairs of the Bank whose action caused, brought about, participated in, aided or abetted violations of section 22(h) of the Federal Reserve Act and section 215.4(c) of Regulation O (12 C.F.R. § 215.4(c)) within the meaning of section 18(j)(3) of the Federal Deposit Insurance Act (12 U.S.C. § 1828(j)(3)).

[.2**]** 7. The FDIC has legal authority to impose a civil money penalty on * * * as a person participating in the affairs of the Bank who caused, brought about, participated in, aided or abetted violations of section 22(h) of the Federal Reserve Act (12 U.S.C. § 375b) and section 215.4(c) of Regulation O (12 C.F.R. § 215.4(c)).

8. The civil money penalty was properly imposed by the FDIC against * * * for violations of Regulation O in accordance with the statutory standards and considerations contained in section 18(j)(3)(B) of the Federal Deposit Insurance Act (12 U.S.C. § 1828(j)(3)(B)).

Discussion

The Notice charges that Mr. * * * , through his positions of Chairman of the Board, President, and principal shareholder of the Bank of * * *, violated section 22(h) of the Federal Reserve Act (12 U.S.C. § 375b) and Regulation O of the Board of Governors of the Federal Reserve System {{4-1-90 p.A-140}}(12 C.F.R. Part 215).[4] In essence, Regulation O establishes a limit on the amount of money a bank may lend to its directors, officers, and principal shareholders. FDIC counsel argues that this case involves a willful violation of Regulation O by Mr. * * * which continued for over two years even through Mr. * * * knew that illegal practices were being engaged by him and the Bank.

In 1978, Congress amended the Federal Reserve Act, in part, to impose a statutory limitation on the

extension of credit to an executive officer and principal shareholders of banks that are members of the Federal Reserve System.[5] The limitation is contained in section 22(h)(1) of the Federal Reserve Act and provides as follows:

> SEC. 22(h)(1). No member bank shall make any loan or extension of credit in any manner to any of its executive officers, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of such member bank...where the amount of such loan or extension of credit...would exceed the limits of loans of a single borrower established by section 84 of this title. (12 U.S.C. § 375b(1)).

Section 84 (12 U.S.C. § 84) prescribes, among other things, a lending limit of 10 percent of capital stock and unimpaired surplus.

The provisions of section 22(h) were made applicable to insured banks that are not members of the Federal Reserve System "in the same manner and to the same extent as if such nonmember insured bank were a State member bank" by 12 U.S.C. § 1828(j)(2). The latter statute also provides that any officer, director, employee, agent, or other person participating in the bank's affairs, who violates section 22(h), shall pay a cash penalty of up to $1,000 per day for each day such violation continues. (12 U.S.C. § 1828(j)(3)(A)).

In 1979, the Board of Governors of the Federal Reserve System adopted Regulation O pursuant to the authority of section 22(h)(7) which empowers the Board to prescribe regulations to effectuate the purposes of the statute. The limitation on extension of credit as provided in Regulation O is as follows:

> *Aggregate Lending Limit*. No member bank may extend credit to any of its executive officers or principal shareholders or to any related interest of that person in an amount that, when aggregated with the amount of all other extensions of credit by the member bank to that person and to all related interests of that person, exceeds the lending limit of the member bank specified in Section 215.2(f) above. (12 C.F.R. § 215.4(c)).

Mr. * * * has admitted that, at all times pertinent to this proceeding, he was the Chairman of the Board, President, and principal shareholder of the bank within the meaning of section 215.2(b) and (c) of Regulation O. (Response of * * * at 2).

Regulation O defines "lending limit" as follows:

> The "lending limit" for a member bank is an amount equal to the limit on loans to a single borrower established by section 5200 of the Revised Statutes, 12 U.S.C. 84. This amount is 10 percent of the bank's capital stock and unimpaired surplus or any higher amount permitted by section 5200 of the Revised Statutes for the types of obligations listed therein as exceptions to the 10 percent limit. A member bank's capital stock and unimpaired surplus equals the sum of (1) the "total equity capital" of the member bank reported on its most recent consolidated report of condition filed under 12 U.S.C. 1817(c)(3), (2) any subordinated notes and debentures approved as an addition to the member bank's capital structure by the appropriate Federal banking agency, and (3) any valuation reserves created by charges to the member bank's income.

[.3**]** Further, the term "extension of credit" is defined as follows by Regulation O:

> An extension of credit is a making or renewal of any loan, a granting of a line of credit, or an extending of credit in any manner whatsoever, and includes:...
> Any other transactions as a result of which a person becomes obligated to pay

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[4] At the hearing, the Notice was amended to delete the second sentence of paragraph 4, page 2, which refers to a $17,642 cash item. (Tr. 368-69) No findings or conclusions have been made with respect to this charge.

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[5] The Financial Institution Regulatory and Interest Rate Control Act of 1978, enacted November 10, 1978 (Pub. L. No. 95–630, 92 Stat. 3641).

> money (or its equivalent) to a bank, whether the obligation arises directly or indirectly, or because of an endorsement on an obligation or otherwise, or by any means whatsoever. (12 C.F.R. § 215.3(a)(8)).

In support of its position that the respondent has violated Regulation O and the Act, FDIC counsel introduced certain documentary exhibits and testimony. The exhibits include, among others, the Bank of * * * Direct Liability Ledger and Commercial Form Voucher (FDIC-1); a summary of certain information derived from reports of condition or "call reports" of the Bank from March 31, 1979 to December 31, 1981 (FDIC-7); an untitled document which summarizes in chart form information contained in FDIC-7 and FDIC-1 and compares Mr. * * * line of credit or indebtedness to the Bank's lending limit; and testimony of three FDIC Bank Examiners, Messrs. * * *, * * *, and * * *. Respondent did not present any witnesses or offer any documents for receipt into evidence.[6]

In essence FDIC argues that the liability ledger (FDIC-1) shows the extensions of credit to the respondent by the Bank during the time period relevant to this proceeding. When that indebtedness is compared to the bank's lending limit, as shown in FDIC-7, the violation of Regulation O and the Act is apparent. Thus, according to FDIC's counsel, respondent's debt to the Bank of * * * was greater than the Regulation O limit for the periods April 18, 1979 through April 13, 1980 and December 23, 1980 through August 6, 1981.[7] (*See* FDIC 8). Proof of the Regulation O violation is supported further by the Reports of Examination of the Bank (FDIC-10, 11, 12) and the testimony of the three bank examiners.

A review of the evidence of record demonstrates that Mr. * * * was in violation of Regulation O and section 22(h) for two distinct and separate periods of time— April 18, 1979 through April 13, 1980 and December 23, 1980 through August 6, 1981.

For the period April 18, 1979 through April 13, 1980, Mr. * * * line of credit ranged from $74,000 to $100,000 (FDIC-7, 8) During the same time period, the lending limit of the bank pursuant to section 215.2(f) was between $33,900 and $48,500 (*Id.*). Thus, Mr. * * * line of credit exceeded the allowable limit by $37,600 on May 12, 1979, $64,000 on December 24, 1979, and $51,500 on April 13, 1980. In addition, Examiner * * * discussed his findings of a violation of Regulation O with the respondent after conducting an examination of the Bank on February 1, 1980. During that conversation, Mr. * * * agreed to correct the violations. (*See* FDIC-12, TR 334-35, 339 and 344-46). Respondent has not argued that this discussion did not take place.

For the second period, December 23, 1980 to August 6, 1981, Mr. * * * line of credit or loan balance was from $65,000 to $100,000. (FDIC-7, 8) During this same period of time, the lending limit of the Bank as defined by section 215.2(f) was between $44,100 and $51,800. (*Id.*) Thus, Mr. * * * line of credit or loan balance exceeded the lending limit by $20,900 on December 23, 1980, $51,600 on March 18, 1981, $50,700 on May 6, 1981, and $49,200 on August 6, 1981.

In addition, Mr. * * * discussed the alleged violations of section 22(h) with Examiner * * * following a visitation examination on January 5, 1981. (TR 246) In addition, Mr. * * * acknowledged the violation of the Act in a resolution adopted by the Bank's board of directors on January 14, 1981, nine days after Mr. * * * visitation examination. In that resolution which is signed by Mr. * * * and the other directors, it states as follows:

> The total indebtedness of Chairman of the Board * * * will be liquidated via cash payment no later than *March 11, 1981*.
>
> In addition, these loans should be reduced immediately via cash payment or sale of a participation to correct the existing violations of FIRA.[8] Further, it is undisputed that Mr. * * * discussed the violations of Regulation O with Mr. * * * on at least two other occasions and promised to take corrective action. (TR

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[6] Respondent did offer two exhibits which were withdrawn by counsel (TR 378-79).

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[7] At p. 14 of the FDIC brief, it states the period is December 30, 1980 through August 6, 1981. This appears to be an error. *See* FDIC proposed findings of fact no. 7 and proposed conclusion of law Nos. 5 and 6.

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[8] The resolution can be found at p. 1-a-1 of FDIC-10. The resolution was also introduced as part of Mr. * * * report of the visitation examination to FDIC Regional Director dated January 15, 1981 (FDIC-9).

{{4-1-90 p.A-142}}

> 255-56, 261) Finally, Mr. * * * testified that the FDIC Report of Examination of July 24, 1981, which was prepared under his supervision, was served on the Bank. (TR 260) This report (FDIC-11) clearly raises the issue of Mr. * * * violation of Regulation O on pages 1-a and 1-b. (*See* also the Reports of Examination for February 1, 1980 (FDIC-12 at pp. 1, 1-b) and May 8, 1981 (FDIC-10 at pp. 1, 1-c)).

Respondent has not challenged or attempted to rebut any of the evidence offered by the FDIC. Instead, respondent argues that the FDIC Notice in this proceeding failed to give adequate notice of the factual basis for the violation charged, that the FDIC evidence was improperly received into the record, and that the evidence of a violation is insufficient.

[.4**]** Respondent is correct in his conclusion that the Notice does not set forth all of the factual basis for the allegations, but there is no requirement that the FDIC do so. While the Notice is not the model of clarity that FDIC counsels argues it to be, it is adequate to apprise respondent of the charge so that he could prepare his defense. The Notice specifically charges Mr. * * * with violating section 22(h) of the Act and section 214.4(c) of Regulation O in that he borrowed more from the Bank than he was allowed to borrow as an officer and principal shareholder under Regulation O limitations. The Notice states the regulation and statute violated, the nature of the violation, and the period during which the violation occurred.

Any uncertainty on Mr. * * * part could have been clarified during the discovery period prior to the hearing in this proceeding. Mr. * * * made no request for clarification of the Notice. It is doubtful that Mr. * * * lacked the information he argues the Notice failed to provide. It is unchallenged that all three FDIC examiners testified that they discussed the violations of Regulation O with Mr. * * * and that he told Mr. * * * and Mr. * * * that he would take corrective action. (*See* TR 197, 202, 226, 227, 246, 255, 261, 334, 339, 344-46).

Respondent argues, among other things, that receipt of the FDIC evidence violates the business records exception to the Hearsay Rule, relying upon Rule 803(b) of the Federal Rules of Evidence, and that the FDIC was not the proper custodian of the Bank's records (FDIC-1).

[.5,.6**]** The Bank's records (FDIC-1) were introduced through Ms. * * * who was appointed to be liquidator of the bank with the appropriate power of attorney. (FDIC-5, 6, TR 53). At the time of the hearing Ms. * * * was the custodian of the bank's records.[9] Under Rule 803(b), records prepared in the regularly conducted course of business may be received into evidence as an exception to the Hearsay Rule if it was the regular practice of the business to prepare such records as shown by the testimony of the custodian or other qualified witness unless there is an indication of lack of trustworthiness. As noted above, Ms. * * * was the custodian of the bank records at the time of the hearing and was a proper person through which to introduce the documents.

Respondent has not argued that FDIC-1 was not prepared in the regular course of the bank's business activity or that the document lacked trustworthiness. Presumably, in his position of President and Chairman of the Board, Mr. * * * would have done so if there was any basis for such arguments. Contrary to respondent's arguments, the better rule is that when the circumstances indicate trustworthiness, it is not necessary that the person who kept the record or even had supervision over its preparation testify. (*United States v. Flom*, 558 F.2d 1179 (5 Cir. 1977); *United States v. Colyer* 571 F.2d 941 (5 Cir. 1978); *United States v. Pfeiffer*, 539 F.2d 668 (8 Cir. 1976).

Respondent argues receipt of the Bank Examination Reports (FDIC-10, 11, 12) was improper because the witnesses did not have direct knowledge of the compilation, accuracy and omissions. Respondent's arguments are without merit. The reports were received into evidence through the testimony of Examiners * * * and * * *. Both gentlemen testified that each was the examiner-in-charge of the examination of the Bank of * * *, that they had supervised the conduct of the examination, that they had prepared the reports of examination, and that they had discussed the reports with Mr. * * * and the other Bank officials. (TR 230 *et seq*, 324 *et seq.*) Both persons were

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[9] In its reply brief at p. 7, FDIC states that the * * * Court of Civil Appeals has enjoined the FDIC and * * * Bank Commission from liquidating the assets of the bank pending a hearing on the merits of a shareholders challenge to the Bank's takeover. FDIC also asserts that under the court order it still has custody of the bank records.

probably the two best individuals to examine or cross examine about the reports.[10]

[.7**]** Respondent has also challenged FDIC-7 and 8 on the basis that the exhibits were prepared specifically for this proceeding and do not qualify for admission under the business records exception. Respondent's argument is without merit. It is a common practice of Federal courts and administrative agencies to receive exhibits which summarize data from various documents into a chart format, and it is not a valid argument that such exhibits are specially prepared for a proceeding. It is only required that the exhibit accurately reflect the data taken from the underlying or supporting documents and that opposing parties be permitted access to the underlying or supporting documents of the exhibit.

FDIC-7 and 8 were prepared by Mr. * * *, an employee of the FDIC, who took data from specific "call

reports" and FDIC-1 and either summarized it (FDIC-7) or presented it in a chart from (FDIC-8). (TR 78 *et seq.*) Since these exhibits were not made available to respondent prior to the hearing, the call reports which form the basis for FDIC-7 were made available to respondent for his review and analysis after the hearing. Respondent's counsel was allowed almost two weeks in which to study the call reports to determine if there were any grounds to object to FDIC-7. (Tr 369-74) No objection was filed, and it can only be assumed that respondent did not find any errors in the exhibit.

In its reply brief, respondent argues that the FDIC case fails to present any evidence of the nature or type of obligations incurred by Mr. * * * . Since this argument was raised in respondent's reply brief, FDIC has not had a fair opportunity to respond. Respondent argues that section 22(h) must be read in conjunction with section 84 (12 U.S.C. § 84) which provides that the 10 percent loss limitation is subject to various exceptions. In essence, respondent argues that since no evidence was introduced that the loan or extensions of credit to Mr. * * * did not fall within the exceptions of section 84, then the FDIC has failed to prove that respondent was actually in violation of "10 percent limit per 12 U.S.C. § 375(b)(1) qua 12 U.S.C. § 84(1)-(14)."

The short answer to this argument is that FDIC has introduced substantial evidence that the loans and extension of credit to Mr. * * * were in violation of Regulation O and the Act. It did not have to prove that the 14 exceptions of section 84 did not affect the 10 percent limitation. Such evidence, if it existed, should have been offered by respondent who should know if any of the exceptions of section 84 affected the loans in question. Respondent did not offer any evidence on this point at the hearing.[11]

Assessment of Civil Penalty

[.8**]** In the Notice, the following order to pay a civil money penalty is provided:

> After taking into account the appropriateness of the penalty with respect to the size of financial resources and good faith of * * * individually, the gravity of the violations, the history of previous violations, the economic benefit that * * * obtained, and such other matters as justice may require, it is ORDERED ...a civil money penalty of $10,000 be, ...assessed against * * *...(Notice at 2)

On brief, FDIC states that it introduced "extensive testimony" concerning these factors and that a $10,000 fine is reasonable. According to FDIC counsel, the fine is especially appropriate in view of the possibility that the FDIC could have assessed a fine of $593,000, one thousand dollars for each day of violation.

Respondent argues that the $10,000 penalty is too large because the FDIC amended the Notice to delete a charge based on a $17,642 "cash item" (Notice at 2, TR 368-69) and because Respondent paid part of his indebtedness before it closed.

Contrary to the assertions of FDIC counsel, this record does not contain "extensive testimony" concerning the factors listed in the Order to Pay Civil Money Penalty. A review of the record demonstrates the lack of specific testimony on those factors.[12] In

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[10] FDIC was also permitted to offer authenticated copies of FDIC-10, 11, and 12 under 28 U.S.C. § 1732 and 1733.

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[11] In its reply at p. 16, respondent notes correctly that FDIC counsel objected to any questions concerning the 14 exceptions. That objection was overruled (TR 134).

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[12] For Example, there is no evidence of Mr. * * * financial resources, the history of previous violations, if any, or the economic benefit that Mr. * * * received. We know how much money Mr. * * * received, but I believe that this (Continued)

{{4-1-90 p.A-144}}addition, the FDIC brief and reply brief deals with those factors in only a cursory manner.

The facts are as follows. The notice charges Mr. * * * with a continuous violation of Regulation O from April 18, 1979 to August 7, 1981, a period of almost 28 months. However, the evidence of record demonstrates Mr. * * *, was in violation of the Regulation for two distinct periods of time, April 18, 1979 to April 13, 1980 and December 23, 1980 to August 6, 1981, a total period of 20 months. In fact, it could be argued that Mr. * * * fulfilled his commitment on February 1, 1980 to Mr. * * * to correct the violation (TR 344).[13] Following the Bank examination of February 1, 1980, Mr. * * * reduced his loans or line of credit with the Bank below the lending limit and was in compliance with the regulation for almost 8 months. (FDIC-8).

While the FDIC has not developed the record sufficiently concerning the factors to be considered, the record is adequate to recommend that the full $10,000 penalty be assessed. Even if one considers that Mr. * * * acted in good faith in April 1980 by reducing his indebtedness to the Bank below the lending limit, he must have realized that he was violating the regulation again when his loan balance rose above the limit in December 1980. Furthermore, for the next eight months he was warned on a number of occasions about the Regulation O violation. In fact, on January 14, 1981, he signed a resolution promising to liquidate his entire indebtedness to the bank by March 11, 1981, and to reduce immediately his indebtedness to correct the violation. (*See* p. 1-a-1, FDIC-10). This promise was not kept. In fact on March 9, 1981, Mr. * * * credit line increased from $66,000 to $100,000, more than double the allowable lending limit. From December 23, 1980 to August 6, 1981, Mr. * * * was in violation of Regulation O and section 22(h) for over 200 days.

In view of this flagrant disregard of the regulation and statute, the assessment of a $10,000 penalty is reasonable and consistent with the requirements of justice.

Miscellaneous

On July 9, 1982, FDIC counsel proposed that certain corrections to the record transcript be made. No response was received from respondent. The proposed corrections are approved and have been made in the transcript of this proceeding.

Conclusion

Accordingly, it is recommended that a penalty of $10,000 be assessed against * * * pursuant to section 215.4(c) of Regulation O (12 C.F.R. § 215.4(c) and section 18(j)(3)(A) of the Federal Deposit Insurance Act (12 U.S.C. § 1828(j)(3)(A)).
/s/ John M. Vittone
Administrative Law Judge
November 24, 1981

[12 Continued:] factor requires more than a mere recitation of dollar amounts. In addition, we do not know if these violations were the causative factor for the Bank to be placed in receivership.

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[13] While there are numerous references in this record to discussions with Mr. * * * concerning Regulation O violations, the February 1, 1980 discussion with Mr. * * * is the earliest citation to a specific meeting. (TR 334, 339, 344-46). There is no specific evidence of any discussions or reports to Mr. * * * or the Bank of the Regulation O violations before February 1, 1980.